Supreme Court, U.S.
FILED
031480 APR 23 2004

No. 03-

IN THE

Supreme Court of the United States

DOMER L. ISHLER and
20TH CENTURY MARKETING, INC.,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOE ALFRED IZEN, JR.
5222 Spruce Street
Bellaire, Texas 77401
(713) 668-8815

Attorney for Petitioners

186963

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Did the Tax Court fail to properly apply "Judicial Estoppel "when it disregarded Hong Kong Corporation, Camaro, Inc.'s, ownership of income it received from Nissei Sangyo/Chicago (NSA) and tax such income to Domer L. Ishler and 20th Century Marketing, Inc.?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, 20th Century Marketing, Inc., is a closely-held private corporation and no publicly held company owns 10% or more of its stock.

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Petitioners, Domer L. Ishler, and 20th Century Marketing, Inc., file this Petition for Writ of Certiorari requesting that this Honorable Court review the Judgment of the United States Court of Appeals for the Eleventh Circuit affirming the decision of the United States Tax Court.

OPINIONS BELOW

A copy of the Decision of the United States Court of Appeals for the Eleventh Circuit affirming the United States Tax Court's Decision is attached as Appendix A. A copy of the Plea Agreement of Petitioner, Domer L. Ishler, in the United States District Court for the Northern District of Alabama is attached as Appendix B. A copy of the Plea Agreement of Petitioner, 20th Century Marketing, Inc., in the United States District Court for the Northern District of Alabama is attached as Appendix C. A copy of the United States Tax Court's Memorandum Opinion is attached as Appendix D. A copy of the Decision of the United States Tax Court for Petitioner, 20th Century Marketing, Inc. is attached as Appendix E. A copy of the Decision of the United States Tax Court for Domer L. Ishler is attached at Appendix F.

STATEMENT OF JURISDICTION

This is a civil appeal from the Decision of the United States Tax Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The United States Tax Court has original subject matter jurisdiction over these tax controversies pursuant to 26 U.S.C. § 7442. Appeal is properly taken by Petitioners to the United States Court of Appeals for the Eleventh Circuit pursuant to 26 U.S.C. § 7482(a)(1) and Rule 15 of Fed. R. App. Proc.

SUMMARY OF THE CASE

Claiming criminal underreporting of income in violation of the Internal Revenue Code, the United States brought criminal charges against Petitioners, 20th Century Marketing, Inc. and Domer L. Ishler, in the United States District Court for the Northern District of Alabama, Northeastern Division.

The corporation, 20th Century Marketing, ultimately entered a Plea Agreement with the United States in which it pled nolo contendere to Count 5 of the indictment against it. 20th Century Marketing did not contest the Government's charge to Count 5 that it had materially underreported its income for tax purposes. Appendix C. The original plea agreement for 20th Century stated that 20th Century had not reported taxes on commissions from NSA. Petitioner Ishler refused to sign the plea agreement on behalf of 20th Century as long as that commission was in consideration. The Assistant United States Attorney crossed out the wording "commissions derived from NSA" and initialed the agreement. Appendix C. This meant that the NSA commission was not the unreported income the IRS was referring to in later proceedings.

Petitioner, Domer L. Ishler, refused to plead guilty to any tax charges in the case before the District Court.

Ultimately, the Government agreed to accept a plea by Ishler to one count of filing a false financial statement with a federally-insured bank. As part of the factual basis for his plea Ishler admitted that he had failed to report the existence of loans from Hong Kong Corporation, Camaro, Inc., to himself. Appendix B.

After accepting the plea agreement and after representing to the sentencing Court that the funds in question were loans from the Hong Kong Corporation to Ishler which were required to be reported on Ishler's loan application, the Internal Revenue Service of the United States, brought an action in the United States Tax Court charging Petitioners, Ishler and 20th Century Marketing, with civil tax fraud for failing to report the monies as income which the Alabama District Court had classified in the plea agreement of Ishler as loans.

Both the Tax Court and, later, the Eleventh Circuit ignored the characterization of the funds as loans instead of income which had been the basis for the plea agreements in the Alabama District Court. Appendices A and D.

Petitioners bring this case for review to this Court in an effort to prevent the Government from making inconsistent representations to the Alabama District Court and the Tax Court and to apply the principles of judicial estoppel to prevent the Government from gaining relief in the Tax Court which is inconsistent as that which the Government obtained before the Alabama District Court.

STATEMENT OF THE CASE

1. THE TAX COURT FAILED TO PROPERLY APPLY "JUDICIAL ESTOPPEL" WHEN IT DISREGARDED HONG KONG CORPORATION CAMARO, INC.'S OWNERSHIP OF INCOME IT RECEIVED FROM NISSEI SANGYO/ CHICAGO. (NSA) AND TAX SUCH INCOME TO DOMER L. ISHLER AND 20TH CENTURY MARKETING, INC.?

The IRS Commissioner makes much use of the doctrine of judicial estoppel where his status in Tax Court litigation is benefited. In the most common scenario, a taxpayer who has pled guilty to violating Title 26 U.S.C. § 7201 (tax evasion) or making some other false statement (Title 26 U.S.C. § 7205) will be charged with, and estopped from denying, civil tax fraud for the same years. *Robert Mitchell, Et Al*, & 82, 162 P-H Memo T.C., P. 82-692 and 693. Judicial estoppel, however, like all other principles has an opposite application, to the Commissioner's detriment on an appropriate set of facts.

Here, the United States government in prosecuting Ishler at the behest of IRS obtained an indictment on tax charges, but dismissed the tax charges in question instead opting to accept Ishler's plea to filing a false loan application which did not list the $100,000 loan he received from Camaro out of the NSA commission proceeds. See Appendix E. Having represented to the Alabama District Court the state of facts supporting the plea including the representation that the loans between Ishler and Camaro were bona fide and should have been reported, the Commissioner of Internal Revenue should be judicially estopped from retaining the benefits of the fraud decision by the Tax Court since it ignored the status of the

monies as loans under the plea agreement and "relied" instead on the proposition that Ishler diverted the "income" from Camaro and was obligated to pay taxes on monies as his own income. Under *Frank v. Mangum*, 237 U.S. 309, 334 (1915) and *Sealfon v. United States*, 332 U.S. 575, 578 (1948), the doctrine of judicial estoppel applies to decisions of criminal Courts as well as to those of civil jurisdiction. A prior criminal conviction may work an estoppel in favor of the Government in a subsequent civil proceeding. *United States v. Greater New York Live Poultry Chamber of Commerce* 53 F.2d 518 (S.D.N.Y. 1931), *aff'd. sub nom., Local 157 v. United States*, 291 U.S. 293 (1934). The Court of Appeals on review in previous cases held that judicial estoppel applies both for and against the Government in *United States v. Killough*, 848 F.2d 1523 (11th Cir. 1988), but then refused to apply that principle against the Government in this case. In *Heckler v. Community Health Services*, 467 U.S. 51 (1984), this Court left open the issue of whether:

> The public interest in insuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some standard of decency, honor, and reliability, in their dealings with their Government . . . And preserve the issue for another day. That day has arrived.

Where facts are represented in a guilty plea to the Court, both the Defendant as well as the prosecution, should be bound by the asserted truth of those facts on which the plea is based in any future litigation. That was the law during the Eleventh Circuit's era in the Fifth Circuit. *Tomlinson v. Lefkowitz*, 334 F.2d 262 (5th Cir. 1964), *cert. denied*, 379 U.S. 962, 85 S. Ct. 650, 13 L. Ed. 2d 556. *United States v. One 1976 Mercedes 450 SLC*, 667 F.2d 1171 (5th Cir. 1982).

When the Government makes factual representations to one of our Courts to obtain a conviction, it should be bound by those same facts in subsequent litigation.

The Commissioner in this case is judicially estopped by prior government conduct from retaining the finding of fraud which he recovered in the Tax Court on a state of facts contrary to those representations made by the Government to the Alabama District Court in order to obtain Ishler's conviction under a plea agreement.

REASONS FOR GRANTING THE PETITION

1. Proper application of the principle of judicial estoppel against the Government in order to prevent abuse of the Federal Court plea bargaining system is a matter of grave national concern.

2. The time is ripe for this Court to define the instances where the Government, by its litigation conduct in a criminal case may be bound by the factual representations it had previously made in a civil case in which it seeks an inconsistent fraudulent result.

CONCLUSION

For the reasons stated herein the Petition for a Writ of Certiorari should be granted. The opinion of the United States Court of Appeals for the Eleventh Circuit should be reversed and this cause remanded with instructions to properly apply principles of judicial estoppel against the Government in the Tax Court litigation.

Respectfully submitted,

JOE ALFRED IZEN, JR.
5222 Spruce Street
Bellaire, Texas 77401
(713) 668-8815

Attorney for Petitioners

APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED NOVEMBER 26, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-16993

U.S. TAX COURT Docket No. 13468-99

DOMER L. ISHLER,

Petitioner-Appellant,

versus

COMMISSIONER OF INTERNAL REVENUE,
Commissioner of Internal Revenue,

Respondent-Appellee.

No. 02-16994

U.S. TAX COURT Docket No. 13469-99

20TH CENTURY MARKETING, INCORPORATED,

Petitioner-Appellant,

versus

COMMISSIONER OF INTERNAL REVENUE,
Commissioner of Internal Revenue,

Respondent-Appellee.

Appendix A

Appeals from the United States Tax Court

(November 26, 2003)

Before ANDERSON, BARKETT and RONEY, Circuit Judges.

PER CURIAM:

Most of appellants' challenges to the rulings of the Tax Court are challenges to that court's findings of fact. We have carefully reviewed this appeal and have held oral argument. Appellants have had ample opportunity in brief and at oral argument, but have failed to point to facts which would indicate that the Tax Court's findings of fact were clearly erroneous. Indeed, at oral argument counsel for appellants was unable to point out such facts, despite explicit questions eliciting same. We readily conclude that the Tax Court's findings are amply supported, and thus not clearly erroneous.

Appellants' other arguments are without merit and warrant no further discussion beyond that at oral argument.[1]

AFFIRMED.

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1. We note that appellants failed to challenge the Tax Court's holding with respect to the suspension of the statute of limitations on account of the pendency of the several summonses. Any such challenge is accordingly waived.

APPENDIX B — PLEA AGREEMENT AND CONDITIONS FILED OCTOBER 6, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

CR 97-PT-0080-NE

UNITED STATES OF AMERICA

v.

DOMER L. ISHLER

PLEA AGREEMENT AND CONDITIONS

The United States of America, the defendant and defendant's attorney each hereby acknowledges the following to be the plea agreement between defendant and the United States and the conditions and understandings that apply to the agreement:

I. *PLEA AGREEMENT*: The United States and the defendant hereby AGREE to the following:

(a) *Plea*: The defendant will plead guilty to *count six of the indictment* in the above-styled cause.

(b) *Recommendation*: Pursuant to Rule 11(e)(1)(B), Fed.R.Crim.P., and upon the Court's acceptance of the aforesaid plea and entry of judgment on the same, the United States will recommend that: Upon the defendant's entry of a plea of guilty to count six

of the indictment, the government will recommend to the court that the defendant be sentenced at the low end of the guidelines range as determined by the Court. The government will further move to dismiss all other counts of the indictment except count five with prejudice. The defendant further agrees that this plea is not contingent upon him resolving any civil tax liability dispute with the Internal Revenue Service. The defendant agrees to pay a fine in the amount of $7,500.00.

(c) *Factual Basis*: The following is a true and correct summary of the factual basis of the offense charged in Count *Six* of the Indictment:

On or about the 12th day of February, 1992, Domer L. Ishler, made a false statement and report to Colonial Bank an institution the accounts of which were insured by the Federal Deposit Insurance Corporation, for the purpose of influencing an application and commitment for a loan to finance property of his wholly owned corporation Twentieth Century Marketing, Inc., that is, he submitted false financial statements wherein he failed to disclose that he had a loan in the approximate amount of $100,000.00 outstanding to Camaro Trading Co Ltd. a Hong Kong corporation.

Appendix B

II. *CONDITIONS AND UNDERSTANDINGS*: The following conditions and understandings apply to the above stated plea agreement:

POSSIBLE SENTENCES AND THE GUIDELINES

(1) *Maximum Possible Sentences:* The defendant is aware of the maximum possible punishments under each count. The defendant is aware that a sentence could include imprisonment, supervised release terms following imprisonment, fines, assessments, **restitutions** and other costs and losses.

(2) *Special Assessment Fees*: The law requires that Special Assessment fees be imposed.

(3) *Restitutions*: The Court may consider ordering **restitution**.

(4) *Guidelines*: Congress has created Sentencing Guidelines which set a sentencing range in this case. These Guidelines take into consideration, among other things, the nature and consequences of the offense, the defendant's role in the offense, other conduct of the defendant and/or coconspirators relevant to the offense, whether the defendant has accepted responsibility, whether the defendant has obstructed justice, and the defendant's criminal record. The Guidelines may require or suggest a variety of punitive measures other than or *in addition* to simple incarceration.

The defendant and the defendant's attorney are aware of the Sentencing Guidelines and have studied their application

to this case. The defendant is aware that the Guidelines can be complicated. The defendant is further aware that the Court ultimately calculates the Guidelines range applicable to this case and is *not bound* by the defendant's or the United States Attorney's calculations.

The Court may even decide that the recommended sentence is not within the Guidelines range and may not follow the recommendation for that reason. Also, the Court may, for just cause, impose a sentence above or below the guidelines range, even the maximum possible sentences under the law.

The defendant does not waive the right to appeal his sentence.

(5) *Non-binding*: It is the Court's duty to impose sentence. The Court is not a party to the above plea agreement. Any sentence recommendation by the United States does not bind the Court, and the Court may impose more severe or less severe sentence than that recommended.

(6) *Sentencing Information*: The United States may make any facts or evidence it deems relevant to sentencing known to the Court.

WITHDRAWAL OF GUILTY PLEA NOT ALLOWED

If the Court decides not to give the recommended sentence, or decides that the recommended sentence is not within the guidelines range, the defendant may not withdraw the plea of guilty.

Appendix B

FAMILIARITY WITH CHARGES

The defendant has read and understands the indictment and information, and has discussed the charges and possible defenses with counsel. The defendant is fully aware of the elements of each count.

ACKNOWLEDGMENT OF GUILT

The defendant is pleading to the charge described above because the defendant is in fact guilty. Should the defendant move the court to accept the plea of guilty under **the provisions of** *North Carolina v. Alford*, 400 U.S. 25 (1970), or tender a plea of *nolo contendere*, the plea agreement described above will be null and void and the United States will not be bound by any agreement, understanding, provision, or stipulation, express or implied in this document.

WAIVERS

By pleading guilty the defendant waives and agrees to waive any and all motions, defenses, objections, or requests which have been made or which could have been made in this case. The defendant also waives the right to trial by jury (or by a judge if the defendant elected to be tried by a judge alone). At any such trial the defendant would have the right to assistance of counsel, to confront and cross-examine the witnesses against the defendant, to present evidence on the defendant's behalf, to compel the attendance of witnesses for the defense, and to testify or refuse to testify. The United States would have the burden or proving the case against the

defendant beyond a reasonable doubt. The defendant would be presumed innocent and could only be convicted if a jury of twelve people (or a judge if the defendant elects to be tried by a judge) unanimously found the defendant to be guilty beyond a reasonable doubt. The defendant would have the right to appeal a guilty verdict. All these rights and protections are hereby expressly waived.

COUNSEL

The defendant has discussed this case at length with defendant's counsel. The defendant is satisfied with counsel's investigation of the case, exploration of possible defenses, advice and other representation.

NON-RELIANCE

Other than what is contained in this document, NO PROMISES OR REPRESENTATIONS HAVE BEEN MADE TO THE DEFENDANT BY THE PROSECUTOR, OR BY ANYONE ELSE, NOR HAVE ANY THREATS BEEN MADE OR FORCE USED, TO INDUCE THE DEFENDANT TO PLEAD GUILTY. The defendant is not relying on any representations from anyone regarding possible parole or release dates. This document represents the sole agreement and understanding between the defendant and the United States.

Appendix B

POST SENTENCE ACTIONS

This document in no way limits any response by the United States to post-sentencing actions, including appeals, motions to correct or review sentences, or habeas corpus petitions.

OTHER DISTRICTS AND JURISDICTIONS

This document **DOES NOT BIND any other United States Attorney** in any other district, nor does it bind state or local authorities.

FORFEITURE AND OTHER CIVIL OR ADMINISTRATIVE PROCEEDINGS

Unless otherwise specified herein, this document in no way applies to or limits any pending or prospective **forfeiture** or other civil or **administrative proceedings**.

TAX PROCEEDINGS

Unless otherwise specified herein, this document in no way applies to or limits any pending or prospective proceedings, related to the defendant's **tax liabilities**, if any.

COMPETENCE

The defendant has not had any drugs, medication or alcohol within the past 48 hours except as stated hereafter, and is competent to enter the plea agreement stated above.

Appendix B

ACKNOWLEDGMENTS

1. I have READ this document, DISCUSSED it with my attorney, and UNDERSTAND and AGREE with all its provisions both individually and totally.

Oct 6, 1997
DATE

s/ Domer L. Ishler
DOMER L. ISHLER

2. I have discussed this case with the defendant in detail and have advised the defendant of the defendant's rights and all possible defenses. The defendant has conveyed to me that he understands this document and consents to all its terms. I believe the plea and disposition set forth herein are appropriate under the facts of this case. I concur in the entry of the plea as indicated above and on the terms and conditions set forth herein.

10-6-97
DATE

s/ David Cromwell Johnson
DAVID CROMWELL JOHNSON
COUNSEL FOR DEFENDANT
DOMER L. ISHLER

3. I have reviewed this document and agree to its provisions.

HERBERT H. HENRY
Acting United States Attorney

10-6-97
DATE

Adolph J. Dean, Jr.
ADOLPH J. DEAN, JR.
Assistant United States Attorney

APPENDIX C — PLEA AGREEMENT AND CONDITIONS DATED AND FILED OCTOBER 6, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CR 97-PT-0080-NE

UNITED STATES OF AMERICA

v.

TWENTIETH CENTURY MARKETING, INC.

PLEA AGREEMENT AND CONDITIONS

The United States of America, the defendant and defendant's attorney each hereby acknowledges the following to be the plea agreement between the defendant and the United States and the conditions and understandings that apply to the agreement:

I. *PLEA AGREEMENT*: The United States and the corporate defendant by and through its 100% owner Domer L. Ishler hereby AGREE to the following:

(a) *Plea*: The corporate defendant by and through its 100% owner Domer L. Ishler will plead guilty to *count five of the indictment* in the above-styled cause.

(b) *Recommendation*: Pursuant to Rule 11(e)(1)(B), Fed.R.Crim.P., and upon the Court's acceptance of

the aforesaid plea and entry of judgment on the same, the United States will recommend that: Upon the corporate defendant's entry of a plea of guilty to count five of the indictment, the government will recommend to the court that the corporate defendant be adjudicated guilty and assessed a fine in the amount of $25,000.00. The goverment will further move to dismiss all other counts of the indictment except count six with prejudice. The corporate defendant further agrees that this plea is not contingent upon it resolving any civil tax liability dispute with the Internal Revenue Service.

(c) *Factual Basis*: The following is a taste and correct summary of the factual basis of the offense charged in Count *Five* of the Indictment:

On or about the 17th day of August, 1989, the corporate defendant Twentieth Century Marketing, Inc. by and through its 100% owner Domer L. Ishler, did knowingly and wilfully make and subscribe to an amended Form II20S United States Corporate Income Tax Return, for the calendar year 1988, which was verified by a written declaration that it was signed under the penalties of perjury and was filed with the Internal Revenue Service, which said amended United States S Corporation Income Tax Return they did not believe to be true and correct as to every material matter in that the said return reported gross receipts in the year 1988 in the amount of $1,932,148.90, whereas, as they then and there knew and believed, Twentieth Century Marketing,

Inc., had received substantial gross receipts [UAU] in said year.

II. *CONDITIONS AND UNDERSTANDINGS*: The following conditions and understandings apply to the above stated plea agreement:

POSSIBLE SENTENCES AND THE GUIDELINES

(1) *Maximum Possible Sentences*: The corporate defendant by and through its 100% owner Domer L. Ishler is aware of the maximum possible punishments under each count. The corporate defendant by and through its 100% owner Domer L. Ishler is aware that a sentence could include, fines, assessments, **restitutions** and other costs and losses.

(2) *Special Assessment Fees*: The law requires that Special Assessment fees be imposed.

(3) *Restitutions*: The Court may consider ordering **restitution**.

(4) *Guidelines*: Congress has created Sentencing Guidelines which set a sentencing range in this case. These Guidelines take into consideration, among other things, the nature and consequences of the offense, the corporate defendant's role in the offense, other conduct of the corporate defendant and/or coconspirators relevant to the offense, whether the corporate defendant by and through its 100% owner Domer L. Ishler has accepted responsibility, whether the corporate defendant has obstructed justice, and the corporate defendant's prior criminal record.

Appendix C

The corporate defendant by and through its 100% owner Domer L. Ishler, and it's attorney are aware of the Sentencing Guidelines and have studied their application to this case. The corporate defendant by and through its 100% owner Domer L. Ishler is aware that the Guidelines can be complicated. The corporate defendant by and through its 100% owner Domer L. Ishler is further aware that the Court ultimately calculates the Guidelines range applicable to this case and is *not bound* by the corporate defendant's or the United States Attorney's calculations.

The Court may even decide that the recommended sentence is not within the Guidelines range and may not follow the recommendation for that reason. Also, the Court may, for just cause, impose a sentence above or below the guidelines range, even the maximum possible sentences under the law.

The corporate defendant by and through its 100% owner Domer L. Ishler does not waive the right to appeal it's sentence.

(5) *Non-binding*: It is the Court's duty to impose sentence. The Court is not a party to the above plea agreement. Any sentence recommendation by the United States does not bind the Court, and the Court may impose a more severe or less severe sentence than that recommended.

(6) *Sentencing Information*: The United States may make any facts or evidence it deems relevant to sentencing known to the Court.

Appendix C

WITHDRAWAL OF GUILTY PLEA NOT ALLOWED

If the Court decides not to give the recommended sentence, or decides that the recommended sentence is not within the guidelines range, the corporate defendant by and through its 100% owner Domer L. Ishler may not withdraw the plea of guilty.

FAMILIARITY WITH CHARGES

The corporate defendant by and through its 100% owner Domer L. Ishler has read and understands the indictment, and has discussed the charges and possible defenses with counsel. The corporate defendant by and through its 100% owner homer L. Ishler is fully aware of the elements of each count.

ACKNOWLEDGMENT OF GUILT

The corporate defendant by and through its 100% owner Domer L. Ishler is pleading guilty to the charge described above because it is in fact guilty. Should the corporate defendant by and through its 100% owner Domer L. Ishler move the court to accept the plea of guilty under **the provisions of** *North Carolina v. Alford*, 400 U.S. 25 (1970), or tender a plea of *nolo contendere*, the plea agreement described above will be null and void and the United States will not be bound by any agreement, understanding, provision, or stipulation, express or implied in this document.

Appendix C

WAIVERS

By pleading guilty the corporate defendant by and through its 100% owner Domer L. Ishler waives and agrees to waive any and all motions, defenses, objections, or requests which have been made or which could have been made in this case. The corporate defendant by and through its 100% owner Domer L. Ishler also waives the right to trial by a jury (or by a judge if the defendant elected to be tried by a judge alone). At any such trial the defendant would have the right to assistance of counsel, to confront and cross-examine the witnesses against the defendant, to present evidence on the defendant's behalf, to compel the attendance of witnesses for the defense, and to testify or refuse to testify. The United States would have the burden of proving the case against the corporate defendant beyond a reasonable doubt. The corporate defendant would be presumed innocent and could only be convicted if a jury of twelve people (or a judge if the defendant elects to be tried by a judge) unanimously found the corporate defendant to be guilty beyond a reasonable doubt. The corporate defendant by and through its 100% owner Domer L. Ishler would have the right to appeal a guilty verdict. All these rights and protections are hereby expressly waived.

COUNSEL

The corporate defendant by and through its 100% owner Domer L. Ishler has discussed this case at length with defendant's counsel. The corporate defendant by and through its 100% owner Domer L. Ishler is satisfied with counsel's investigation of the case, exploration of possible defenses, advice and other representation.

Appendix C

NON-RELIANCE

Other than what is contained in this document, NO PROMISES OR REPRESENTATIONS HAVE BEEN MADE TO THE CORPORATE DEFENDANT BY THE PROSECUTOR, OR BY ANYONE ELSE, NOR HAVE ANY THREATS BEEN MADE OR FORCE USED, TO INDUCE THE DEFENDANT TO PLEAD GUILTY. The corporate defendant by and through its 100% owner Domer L. Ishler is not relying on any representations from anyone regarding possible parole or release dates. This document represents the sole agreement and understanding between the corporate defendant and the United States.

POST SENTENCE ACTIONS

This document in no way limits any response by the United States to postsentencing actions, including appeals, motions to correct or review sentences, or habeas corpus petitions.

OTHER DISTRICTS AND JURISDICTIONS

This document **DOES NOT BIND any other United States Attorney** in any other district, nor does it bind state or local authorities.

FORFEITURE AND OTHER CIVIL OR ADMINISTRATIVE PROCEEDINGS

Unless otherwise specified herein, this document in no way applies to or limits any pending or prospective **forfeiture** or other **civil** or **administrative proceedings**.

Appendix C

TAX PROCEEDINGS

Unless otherwise specified herein, this document in no way applies to or limits any pending or prospective proceedings, related to the corporate defendant's **tax liabilities, if any**.

COMPETENCE

The corporate defendant by and through its 100% owner Domer L. Ishler has not had any drugs, medication or alcohol within the past 48 hours except as stated hereafter, and is competent to enter the plea agreement stated above.

ACKNOWLEDGMENTS

1. I have READ this document, DISCUSSED it with my attorney, and UNDERSTAND and AGREE with all its provisions both individually and totally.

10-6-97	s/ Domer L. Ishler
DATE	DOMER L. ISHLER
	ON BEHALF OF TWENTIETH
	CENTURY MARKETING, INC.
	AN ALABAMA CORPORATION

2. I have discussed this case with the corporate defendant by and through its 100% owner Domer L. Ishler in detail and have advised the corporate defendant of it's rights and all possible defenses. The corporate defendant by and through its 100% owner Domer L. Ishler has conveyed to me that he understands this document and consents to all its terms. I believe the plea and disposition

set forth herein are appropriate under the facts of this case. I concur in the entry of the plea as indicated above and on the terms and conditions set forth herein.

10-6-97	s/ Virginia Vinson
DATE	COUNSEL FOR DEFENDANT TWENTIETH CENTURY MARKETING, INC. AN ALABAMA CORPORATION

3. I have reviewed this document and agree to its provisions.

HERBERT H. HENRY
Acting United States Attorney

10-6-97	s/ Adolph J. Dean, Jr.
DATE	ADOLPH J. DEAN, JR. Assistant United States Attorney

APPENDIX D — MEMORANDUM FINDINGS OF FACT AND OPINION OF THE UNITED STATES TAX COURT FILED MARCH 28, 2002

T.C. Memo. 2002-79

UNITED STATES TAX COURT

DOMER L. ISHLER, Petitioner *v.*
COMMISSIONER OF INTERNAL REVENUE, Respondent

20TH CENTURY MARKETING, INC., Petitioner *v.*
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 13468-99, 13469-99.[1] Filed March 28, 2002.

Michael K. Wisner, *David E. McGehee*, and *D. Ashley Jones*, for petitioners.

Marshall R. Jones, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

COLVIN, *Judge*: Respondent determined deficiencies in petitioners' Federal income tax and additions to tax as follows:

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1. These cases were consolidated for trial, briefing, and opinion.

Domer L. Ishler

Year	*Deficiency*	*Additions to tax* *Sec. 6653(b)(1)(A)*	*Sec. 6653(b)(1)(B)*	*Sec. 6661*
1987	$112,227	$84,170	[1]	$28,057
1988	396,659	297,494	—	99,165

1. 50 percent of the interest due on $112,227.

20th Century Marketing, Inc.

Year ended	*Deficiency*	*Additions to tax* *Sec. 6653(b)(1)(A)*	*Sec. 6653(b)(1)(B)*	*Sec. 6661*
Dec. 31, 1987	$118,314	$88,736	[1]	$29,579

1. 50 percent of the interest due on $118,314.

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Domer L. Ishler (petitioner) was president and owned all of the stock of petitioner corporation, 20th Century Marketing, Inc. (TCM). TCM earned commissions on sales of electronic components to Chrysler Corp. Petitioner arranged for a Hong Kong corporation, Camaro Trading Co., Ltd. (Camaro), to receive commissions which otherwise would have been paid to TCM. The issues in dispute primarily relate to whether Camaro was paid for services performed by Camaro, as petitioner contends, or as a device to avoid taxation of most of that commission income, as respondent contends.

After concessions,[2] the issues for decision are:

1. Whether TCM had unreported income of $307,696 in 1987 and whether petitioner had unreported income of $308,723 in 1987 and $1,421,218 in 1988. We hold that they did.

2. Whether petitioner is liable for the addition to tax for fraud under section 6653(b) for 1987 and 1988 and whether TCM is liable for fraud for 1987. We hold that petitioner is and that TCM is not.

3. Whether the statute of limitations bars assessment of tax for 1987 and 1988. We hold that it does not.

4. Whether petitioner is liable for the addition to tax under section 6661 for substantial understatement for 1987

2. Respondent concedes that petitioner corporation overreported interest income by $1,632.73 for 1987, and that petitioner overreported interest income of $6,359 for 1988.

and 1988, and whether TCM is liable for the section 6661 addition to tax for 1987. We hold that they are. Unless otherwise indicated, section references are to the Internal Revenue Code in effect for the years in issue.

Unless otherwise indicated, Rule references are to the Tax Court Rules of Practice and Procedure.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found.

A. *Petitioners*

1. *Domer Ishler*

Petitioner lived in Huntsville, Alabama, when he filed his petition in this case. He graduated from high school and completed 6 months of trade school in electronics.

Lela Ishler is petitioner's mother, and her husband is D. Marvin Ishler. Marvin M. Ishler is petitioner's brother. Traci Ishler is petitioner's daughter. Joyce Ishler Eller (Eller) is petitioner's former wife. Melonee Hudson (Hudson) was petitioner's niece. She died in July 1994.

During the 1980s, petitioner conducted business and investment activities through a sole proprietorship named Double D Investments. Petitioner maintained a checking account at Central Bank in Huntsville for Double D (the Double D account).

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2. *20th Century Marketing, Inc.*

TCM's principal office was in Huntsville when it filed its petition in this case. Petitioner incorporated TCM in 1967 and was its only employee until 1970. TCM was a C corporation for 1987 and an S corporation for 1988. Petitioner was TCM's sole shareholder and chief executive officer in 1987 and 1988. TCM had 34 employees and annual sales of about $90 million by 1989.

TCM sold electronic components provided by manufacturers, or by intermediaries such as Nissei Sangyo America, Ltd. (NSA), to manufacturers such as Chrysler. TCM earned commissions on its sales.

B. *Other Business Entities*

1. *NSA*

NSA is an Illinois corporation and subsidiary of Hitachi. It supplied electronic and mechanical components to car manufacturers during the years in issue.

2. *Camaro*

Camaro was incorporated by Philip Lawrence Choy (Choy) under the laws of Hong Kong on July 19, 1983. Choy was Camaro's management nominee.[3] Camaro opened a

3. Kay Chou and her brother-in-law Chen paid Choy, a registered agent in Hong Kong, to incorporate Camaro, using nominee companies as Camaro's shareholders. He substituted the names of the shareholders in the corporate charter. Camaro was ready for business the next day. The names of Chou and Chen do not appear in Camaro's records because Camaro's shareholders were nominee companies. Choy was not an officer of Camaro.

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Hong Kong dollar-denominated checking account and a U.S. dollar-denominated savings account at the Hongkong & Shanghai Banking Corp., Ltd. (HSBC), in Hong Kong in July 1983. Petitioner's initial contact with Camaro was in 1983, through his friend, Richard Adler, whose common law wife, Kay Adler (also known as Jo Ying Ying or Kay Chou), was one of Camaro's beneficial owners.[4]

Camaro had no employees, salesmen, traders, or marketers. Camaro had no office or employees in Alabama.

a. *Petitioner's Signature Authority Over Camaro Funds*

On August 4, 1983, Choy and petitioner opened a U.S. dollar-denominated savings account and a Hong Kong dollar-denominated checking account in Camaro's name at Standard Chartered Bank (SCB) in Hong Kong. Only Choy and petitioner had signature authority over those accounts. The accounts were closed on May 1, 1989.

In 1986, at petitioner's suggestion to Choy, Thomson McKinnon Securities, Inc. (TM), opened a brokerage account for Camaro. Only petitioner had signature authority over that account. On September 30, 1987, TM issued a $23,250 check to Camaro from funds in Camaro's TM account. Petitioner endorsed the check as Camaro's agent to Valar Resources, Ltd., a Canadian company. Camaro's TM account was closed on February 22, 1988.

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4. Kay Chou's brother-in-law Chen was Camaro's other beneficial owner in 1987 and 1988.

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b. *Petitioner's Diversion of $12,328 of TCM Commissions to Camaro in 1983-84*

NSA sold electronic components to SCI Components, Inc. (SCI), of Huntsville in 1983 and 1984. From August 23 to November 21, 1983, NSA sent seven invoices to SCI for sales of electronic components. On March 30, 1984, NSA issued a $12,328 check to TCM for commissions on those sales. Petitioner returned the check to NSA, and NSA voided it. On June 20, 1984, he wrote to NSA on TCM letterhead asking that a new commission check be issued and sent to Camaro at a Hong Kong address. NSA sent a check to Camaro for $12,328 on June 25, 1984, and Camaro negotiated it on July 13, 1984.

c. *Petitioner's Representation in 1993 That He Was an Owner of Camaro*

On September 16, 1983, Intergraph Corp. (Intergraph) of Huntsville bought 147,000 16K computer memory chips from Camaro for $235,200. Petitioner endorsed the check as "owner" of Camaro.

d. *Camaro's SCB VISA Card*

On November 30, 1985, Choy and petitioner applied to SCB for a VISA card for Camaro. A November 29, 1985, Camaro board resolution authorized petitioner to sign on behalf of Camaro with respect to the SCB VISA card. On December 27, 1985, SCB opened a corporate VISA card account in petitioner's name.

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Petitioner was the only authorized user of the SCB VISA card. He used it in 1987 and 1988. SCB sent the monthly statements for the SCB VISA card to petitioner at Camaro's Hong Kong address. The amounts due were paid from Camaro's HSBC Hong Kong dollar-denominated current account. Choy canceled petitioner's SCB VISA card on August 17, 1989.

C. *The Sale of Shinwa Radio/Cassette Players to Chrysler*

1. *Shinwa Radio/Cassette Players*

NSA supplied electronic and mechanical components from 1983 to 1988 for installation on Chrysler vehicles. One such component was a radio/cassette player (the Shinwa) manufactured by Shinwa, a Japanese company that had a factory in China.

2. *The NSA/Camaro and Camaro/TCM Agreements*

Chrysler's Acustar division, located in Huntsville, manufactured components for installation on Chrysler vehicles. NSA supplied Shinwas to the Acustar division. TCM earned commissions in 1986 as NSA's representative for sales by NSA of small quantities of Shinwas to Chrysler.

In late 1986, Chrysler asked Shinwa to supply all of Acustar's radio/cassette players. Shinwa agreed to supply radio/cassette players to Chrysler for 3 years beginning in 1987. Chrysler expected to buy $30 million of Shinwas annually.

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A draft agreement dated January 1, 1987, relating to the sale by NSA of Shinwas to Chrysler named NSA as the principal and TCM as the representative. Koichi Maekawa (Maekawa), president of NSA, signed the draft agreement, but petitioner did not sign it. At petitioner's request, Camaro, not TCM, was named as the representative. A sales representative agreement (the NSA/Camaro agreement), dated January 1, 1987, and executed on September 1, 1987, was signed by Maekawa as president of NSA and by petitioner on behalf of Camaro.

Under the NSA/Camaro agreement, Camaro agreed to "use its best efforts and skills to sell, promote and generally create a demand for * * * [Shinwas] to * * * [Chrysler]", in exchange for which it would receive a commission of 5 percent of the net proceeds of sales of Shinwas by NSA to Chrysler.

Despite the NSA/Camaro agreement, NSA did not deal with Camaro and considered TCM to be its sales representative. Camaro did not negotiate, price, or set terms relating to the Shinwa transaction and had no role in delivering the Shinwas to Chrysler. NSA bought and took title to the radio/cassette players from Shinwa because Camaro could not take title to or provide financing for $30 million worth of Shinwa cassette mechanisms.

NSA began shipping large quantities of Shinwas to Chrysler in June 1987. On June 30, 1987, at petitioner's request, Hideo Wakashita (Wakashita), a mid-level manager of NSA, sent an internal NSA memo requesting that future commissions on the sale of Shinwas to Chrysler/Acustar be paid to Camaro and sent to petitioner at TCM in Huntsville.

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Choy, on behalf of Camaro, and petitioner, as CEO/president of TCM, signed an agreement (the Camaro/TCM agreement) on August 31, 1987. The Camaro/TCM agreement provided that TCM would receive 10 to 30 percent of the commissions earned by Camaro on the sales of Shinwas to Chrysler.

Jerry Scott Taylor (Taylor) was a sales representative for TCM from 1984 to 1989. Taylor was a member of TCM's board of directors from late in 1987 to 1989. The board began meeting around 1987. Taylor attended board meetings.

Taylor began working on the Chrysler/Acustar account late in 1984 or early in 1985. He performed the day-to-day business activities relating to Chrysler's purchase of the Shinwa cassette mechanisms. Taylor used TCM's name and letterhead, not Camaro's, in dealing with NSA. Taylor first heard of Camaro in 1988, and first learned of the 1987 Camaro/TCM agreement in 1992.

On January 27, 1988, Camaro issued to Taylor a $5,000 check drawn on its U.S. dollar-denominated savings account. No company name appeared on the $5,000 check. Taylor believed this payment was an advance from petitioner of a bonus for his work for TCM.

3. *Termination of the NSA/Camaro Agreement*

NSA terminated the NSA/Camaro agreement on March 31, 1989. In the notice of termination, NSA stated that Camaro had let NSA erroneously assume that Camaro was an Alabama corporation when the agreement was executed.

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Because Camaro was a Hong Kong corporation, NSA faced unexpected liability for a large amount of withholding tax under section 881(a) (plus penalties and interest). On April 12, 1989, NSA told Camaro that NSA would retain unpaid commissions otherwise due to Camaro to offset that potential tax liability.

D. *Petitioners' Bank Accounts*

Petitioner maintained a checking account at Central Bank in Huntsville in 1987 and 1988 for himself (the personal checking account). TCM maintained an operating account, a money market account, and a payroll account at Central Bank in 1987 and 1988. TCM deposited the following amounts to those accounts in 1987 and 1988:

		Account	
Year	*Operating*	*Money market*	*Payroll*
1987	$1,483,102	$569,428	$688,300
1988	2,153,995	984,528	—

E. *Payments to TCM Which Were Not Deposited in TCM Accounts*

1. *1987*

Between February 9 and September 22, 1987, on behalf of TCM, petitioner endorsed and deposited to the Double D account 17 checks payable to TCM totaling $19,738.95. Midtex Relays, Inc., issued a $2,106.63 check to TCM on July 30, 1987. Petitioner endorsed the check on behalf of

TCM but did not deposit it in any account maintained by petitioner or TCM. NSA issued a $1,698.35 check to TCM, which petitioner deposited in his personal checking account on August 27, 1987.

2. *1988*

On January 8, 1988, Montrose Products Co. issued a $3,918.80 check to TCM. Petitioner endorsed the check on behalf of TCM but did not deposit it in an account maintained by petitioner or TCM. The check was cashed. In February and March 1988, on behalf of TCM, petitioner endorsed and deposited in the Double D account two checks payable to TCM totaling $1,958.60.

F. *Camaro Checks Reported by TCM*

TCM deposited two checks from Camaro totaling $11,789.54 in its operating account in October 1987. TCM reported this amount on its 1987 return. Between January 4 and October 25, 1988, TCM deposited checks from Camaro totaling $166,416.10 in its operating and money market accounts. TCM reported this amount on its 1988 return.

G. *Payments From NSA to Camaro in 1987 and 1988*

1. *1987*

Between September 11 and November 20, 1987, NSA issued five checks totaling $298,601.27 to "Camaro Trading Co., Ltd." or "Camaro Trading Co., Ltd. Attn: Mr. D. Ishler". TCM received these checks in Huntsville but did not deposit them in a TCM account. TCM sent them to Camaro in Hong Kong.

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2. *1988*

Between January 4 and December 22, 1988, NSA issued 13 checks totaling $1,569,596.15 to "Camaro Trading Co., Ltd." or "Camaro Trading Co., Ltd. Attn: MR. D. ISHLER". TCM received these checks in Huntsville but did not deposit them in a TCM account. TCM sent them to Camaro in Hong Kong.

3. *Camaro's Deposit of the NSA Checks*

Camaro paid Berlin Co. Exchange, Ltd., of Hong Kong a small fee to cash the NSA checks (discussed above in paragraph G). From September 1987 to January 1989, Camaro deposited $1,864,402.71 (of the $1,868,197.42 total proceeds of the NSA checks) to the HSBC U.S. dollar-denominated savings account.

H. *Camaro's Payments to or on Behalf of Petitioner*

Petitioner caused Camaro to make the following transfers to him or on his behalf in 1987 and 1988.

1. *Camaro's Payments to Marvin M. Ishler (Petitioner's Brother)*

From October 29, 1987, to March 25, 1988, Camaro transferred $16,000 from its U.S. dollar-denominated savings account to Marvin M. Ishler (petitioner's brother). On March 25, 1988, Camaro transferred $5,000 to Odyssey Tours, owned by Marvin M. Ishler.

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2. *Petitioner's Payments for the Benefit of Eller*

On June 1, 1988, petitioner told Choy to issue a $6,500 check to Dr. Harvey A. Weiss from Camaro's HSBC U.S. dollar-denominated savings account. A $6,500 check dated June 1, 1988, was issued to Dr. Weiss and deposited in his account on June 23, 1988. These funds were used to pay for plastic surgery for Eller. Also on June 1, 1988, Camaro transferred $2,000 from its U.S. dollar-denominated savings account to Eller.

3. *Payments to or for the Benefit of Petitioner's Daughter*

On March 25, 1988, Camaro transferred $5,000 from its U.S. dollar-denominated savings account to petitioner's daughter. On June 7, 1988, petitioner told the Hong Kong office of HSBC to wire $27,820 to a BMW dealer to pay for a 1987 BMW for petitioner's daughter. On June 18, 1988, the car dealer issued a $1,000 check (refunding the deposit paid for the BMW) payable to the Bank of San Clemente. This check was used to buy a $1,000 Bank of San Clemente cashier's check, payable to petitioner. On June 23, 1988, petitioner deposited the check in his personal checking account.

4. *Petitioner's Deposit of Camaro Funds in His Personal Checking Account*

On August 23, 1988, petitioner told Choy to issue a $5,000 check payable to Sinja Kim, a friend of petitioner, from Camaro's HSBC U.S. dollar-denominated savings

account. HSBC issued a $5,000 check dated August 23, 1988, to Sinja Kim. Sinja Kim and Sharon Woodard, an employee of TCM, endorsed the check. Sharon Woodard deposited it in petitioner's personal checking account on October 6, 1988.

5. Transfer of $35,000 From Camaro Via Petitioner's Mother to TCM's Operating Account

On September 22, 1988, Camaro directed HSBC to issue four checks totaling $35,000 to Lela Ishler from Camaro's HSBC U.S. dollar-denominated savings account. HSBC issued the checks on September 22, 1988. On October 10, 1988, Lela Ishler opened a money market account at Bank of the South, Dothan, Alabama. She deposited $17,000 in that account in October 1988. She also deposited $17,700 in her account at SouthTrust Bank of Dothan, Alabama, and received $300 in cash in October and November 1988.

Marvin M. Ishler had signature authority for Lela Ishler's money market account. On November 21, 1988, Bank of the South issued a $26,000 cashier's check to Marvin M. Ishler from funds in Lela Ishler's money market account. Marvin M. Ishler and petitioner endorsed the check, and petitioner deposited it in the TCM operating account on November 22, 1988.[5]

Marvin M. Ishler also had signature authority for Lela Ishler's SouthTrust account. On November 21, 1988, Marvin

5. Although TCM's 1988 year is not before the Court and neither party focuses on TCM's receipt of this $35,000, we note that the parties stipulated that TCM reported all business receipts deposited to its accounts in 1988.

M. Ishler wrote a $9,000 check payable to cash on the SouthTrust account. He used those funds to buy a $9,000 SouthTrust official check payable to petitioner, which petitioner endorsed and deposited in the TCM operating account on November 22, 1988.

6. *Camaro's Transfer of $5,000 to Hudson (Petitioner's Niece)*

On December 5, 1988, petitioner told Choy to have HSBC issue a $5,000 check to petitioner's niece, Hudson, from Camaro's HSBC U.S. dollar-denominated savings account. On December 19, 1988, Hudson deposited the HSBC check in her credit union account. Hudson died in July 1994. By letter dated August 30, 1994, petitioner stated that he had lent her $5,000 and demanded that Hudson's estate repay that amount.

7. *Transfer of $10,000 From Camaro to Sylvia Mangin*

On May 26, 1988, pursuant to petitioner's instruction to Choy, Camaro transferred $10,000 from its U.S. dollar-denominated savings account to Sylvia Mangin to pay the expenses of a ski trip taken by the Mangins and petitioner's family.

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I. *Petitioners' Tax Returns*

1. *Petitioners' Tax Return Preparer*

Sidney R. White (White), C.P.A., prepared TCM's and petitioner's tax returns for 1987 and 1988 and petitioner's amended tax returns for 1987 and 1988. Petitioner gave White the information he used to prepare those returns. Petitioner did not give White records of any of the Camaro accounts. Petitioner did not tell White that TCM had sent NSA checks to Hong Kong or that petitioner had signature authority over any Camaro accounts.

2. *Petitioner's 1987 and 1988 Returns*

Petitioner did not report income from the 1987 and 1988 NSA checks issued to Camaro on his 1987 and 1988 returns or 1987 and 1988 amended returns. Petitioner filed his 1987 return on October 19, 1988, and his amended 1987 return on May 15, 1989. Petitioner filed his 1988 return on September 28, 1989, and respondent received his amended 1988 return on January 22, 1990.

3. *TCM's 1987 and 1988 Returns*

TCM did not report income from the 1987 and 1988 NSA checks issued to Camaro on its 1987 and 1988 tax returns. TCM overstated its deductions by $6,359 on its 1988 return. Petitioner signed and filed all of TCM's tax returns.

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J. *Petitioners' Indictments and Guilty Pleas*

In March 1997, petitioner, TCM, and Camaro were indicted by a grand jury on several counts. Petitioner pled guilty to making a false statement on a 1992 loan application, and TCM pled guilty under section 7206(1) to filing a false amended income tax return for 1988.

K. *Statute of Limitations and Petition To Quash Summons*

1. *Proceedings in the U.S. District Court for the Northern District of Alabama*

On October 4, 1990, respondent served nine third-party administrative summonses relating to petitioners' and Camaro's tax liabilities for the 1983 through 1989 tax years. Petitioners and Camaro filed a petition to quash the nine summonses (the Alabama petition to quash) in the U.S. District Court for the Northern District of Alabama (the Alabama District Court) on October 10, 1990.

Respondent served four more third-party administrative summonses relating to petitioners' and Camaro's tax liabilities for the 1983-89 tax years in October 1990. Around October 29, 1990, petitioners and Camaro amended the Alabama petition to quash to include the four additional third-party summonses.

On April 29, 1991, the Alabama District Court denied the Alabama petition to quash as to 12 of the 13 summonses. On June 10, 1991, the Alabama District Court granted the petition with respect to one of the summonses.

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2. *Proceedings in the U.S. District Court for the Southern District of New York*

On October 11, 1990, respondent served a third-party recordkeeper summons on SCB, directing the production of certain documents relating to petitioners' and Camaro's tax liabilities for the 1983-89 tax years. On October 12, 1990, respondent served summonses on the Hongkong Bank (the HKB summons) and on HSBC (the HSBC summons) relating to petitioners' and Camaro's tax liabilities for the 1983 through 1989 tax years.

On November 2, 1990, SCB's attorneys responded to the SCB summons but did not produce the records identified in the summons.

On August 29 and 30, 1991, the United States moved to enforce the HSBC and the SCB summonses in the U.S. District Court for the Southern District of New York (the New York District Court). On March 24, 1992, the New York District Court filed a stipulation and order in which it stated that it would request judicial assistance from the Supreme Court of Hong Kong to obtain the discovery sought by the SCB and HSBC summonses, and the parties agreed to a stay of the summons enforcement proceedings to permit the United States to seek judicial assistance from the Supreme Court of Hong Kong. The order stayed the enforcement of the SCB and HSBC summonses pending resolution of the judicial assistance request.

The Alabama District Court executed a request for judicial assistance of the Supreme Court of Hong Kong on July 23, 1993. The Supreme Court of Hong Kong granted the Alabama District Court's request for judicial assistance on March 25, 1994.

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From November 1994 to August 1997, the Alabama District Court made supplemental requests for judicial assistance from the Supreme Court of Hong Kong seeking documents which had been requested in the SCB and HSBC summonses but not produced in response to the granting by the Supreme Court of Hong Kong in March 1994 of the request for judicial assistance.

On December 8 and 16, 1998, the New York District Court entered stipulations in which the United States withdrew its motions to enforce the HSBC and SCB summonses, respectively.

L. *The Notices of Deficiency*

Respondent began the audit of these cases before October 1990 and issued notices of deficiency to petitioner and TCM on May 12, 1999.

OPINION

A. *Unreported Income*

1. *Contentions of the Parties*

Respondent contends that petitioner had unreported income of $308,723.36[6] in 1987 and $1,421,217.97[7] in 1988, and that

6. Respondent determined that petitioner had unreported income of $310,314.00 for 1987 but now contends that petitioner had unreported income of $308,723.36.

7. Respondent determined that petitioner had unreported income of $1,404,026 for 1988 but now contends that petitioner had unreported income of $1,421,217.97. Respondent bears the burden of proving the increased deficiency. Rule 142(a)(1).

TCM had unreported income of $307,695.61[8] in 1987.[9] Respondent contends that TCM was taxable on the commissions NSA paid to Camaro in 1987 and on the 1987 checks payable to TCM but deposited in petitioner's personal checking account or the Double D account or cashed without being deposited. Respondent also contends that TCM's unreported income for 1987 described above is taxable as a constructive dividend to petitioner, and that petitioner is liable for tax on his distributive share of TCM's income for 1988 from checks (a) payable to TCM but deposited in petitioner's personal checking account, the Double D account, or cashed without being deposited, and (b) payable to Camaro instead of TCM.

Petitioners contend that Camaro earned the money it received from NSA.

2. *Whether Camaro Earned the Money It Received*

Petitioners contend that Camaro was essential to NSA because Camaro could take title to the Shinwas and resell them to NSA and Chrysler. Petitioners also contend that Camaro could provide essential services such as financing

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8. Respondent determined that TCM had unreported gross receipts of $309,286 for 1987 but now contends that TCM had unreported gross receipts of $307,695.61.

9. Respondent contends that TCM had unreported income of $307,696 and petitioner had unreported income of $308,723 for 1987. The difference ($1,027) in those amounts is attributable to adjustments made by respondent affecting only the return of either petitioner or TCM.

to meet Chrysler's needs as its needs for Shinwas grew. We disagree; Camaro could not and did not take title to or provide financing for $30 million worth of Shinwas annually.

Petitioners contend Camaro was essential to the Shinwa transaction because it had an export license which was needed to ship the Shinwas to Chrysler in the United States. However, there is no evidence that Camaro had an export license or that Camaro shipped the Shinwas.

Petitioner did not tell Taylor about the NSA/Camaro contract. Taylor was the TCM employee who handled Chrysler's purchase of Shinwas, and he had been a member of TCM's board of directors since 1987. Taylor said that he knew of no legitimate business purpose for the TCM/Camaro relationship. To the best of Taylor's knowledge, petitioner never reported the existence of the NSA/Camaro agreement to TCM's board. TCM's board did not ratify or approve the NSA/Camaro agreement.

Wakashita, a mid-level manager of NSA, considered TCM to be its sales representative on the Shinwa transaction from 1987 to 1989. He regularly dealt with Taylor and knew of no business activity by Camaro relating to the Shinwa transaction. Kerry L. Langdon, Chrysler's Huntsville purchasing agent, was not aware of anything that Camaro contributed to the Chrysler/NSA/TCM relationship. Camaro did not negotiate, price, or set terms relating to the Shinwa transaction and had no role in delivering the Shinwas to Chrysler.

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Petitioners contend that we should view Wakashita's testimony as biased because Camaro had failed to inform NSA that Camaro was a foreign corporation, payments to which by NSA may have been subject to withholding tax under section 881(a). We disagree, and we note that the testimony of Kerry Langdon and Taylor corroborated Wakashita's testimony.

Petitioner testified that he needed to keep Camaro as a party to the agreement to protect his business reputation and because Camaro might be a lucrative source of future business in China for TCM. We disagree. There is no credible evidence to support those claims. We conclude that Camaro performed no bona fide services for the Shinwa-Chrysler transaction.

3. *Conclusion*

Income is taxed to the party which earns it; the incidence of taxation cannot be shifted by an anticipatory arrangement. *Helvering v. Horst*, 311 U.S. 112, 119-120 (1940); *Lucas v. Earl*, 281 U.S. 111, 114-115 (1930); *Kimbrell v. Commissioner*, 371 F.2d 897, 901-902 (5th Cir. 1967), affg. T.C. Memo. 1965-115. We do not recognize petitioner's diversion of TCM's commission income to Camaro for Federal income tax purposes. We conclude that TCM understated its taxable income in 1987 by failing to report: (1) $298,601.27 from NSA checks payable to Camaro; (2) $19,738.65 that TCM received but diverted to petitioner's Double D account; (3) $2,106.63 that TCM received but did not deposit to a TCM account; and (4) $1,698.35 that TCM

received but that was diverted to petitioner's personal account.[10]

Where a shareholder diverts corporate funds to his or her own use, those funds generally are constructive dividends to the shareholder and are ordinary income to the extent of the corporation's earnings and profits. Secs. 301, 316; *Truesdell v. Commissioner*, 89 T.C. 1280, 1295 (1987); *Falsetti v. Commissioner*, 85 T.C. 332, 356-357 (1985); *Henry Schwartz Corp. v. Commissioner*, 60 T.C. 728, 744 (1973). Petitioner does not contend that TCM's earnings and profits were less than the amount of constructive dividends respondent determined. We conclude that all of TCM's unreported income was constructive dividend income to petitioner because he caused NSA to divert TCM's income to Camaro and he used some of the diverted funds for his own benefit. We do not limit our holding to the amount respondent can prove was spent for petitioner's personal benefit because respondent's determination is presumed to be correct for 1987, see *Levitt v. Commissioner*, T.C. Memo. 1995-464, affd. without published opinion 101 F.3d 691 (3d Cir. 1996), and respondent presented sufficient evidence to carry the burden of proving the increased deficiency for 1988.

TCM was an S corporation in 1988, and so it is not taxable on any unreported income it had for that year; that income passes through to petitioner. Sec. 1366.

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10. TCM had unreported income of $322,144.90, minus the amount of Camaro checks TCM deposited and reported ($11,789.54) and the amount by which TCM overstated its gross business receipts for 1987 ($2,660).

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We conclude that petitioner understated his taxable income by failing to report constructive dividends from TCM of $308,723.36 in 1987 and his 100-percent distributive share of TCM's unreported income of $1,421,217.97 in 1988.

B. *Additions to Tax for Fraud Under Section 6653(b)*

1. *Background*

Respondent contends that petitioner is liable for the addition to tax for fraud under section 6653(b) for 1987 and 1988 and that TCM is liable for the addition to tax for fraud under section 6653(b) for 1987. Respondent has the burden of proving fraud by clear and convincing evidence. See sec. 7454(a); Rule 142(b). Respondent must establish: (a) Each petitioner underpaid tax for each year in issue, and (b) some part of the underpayment is due to fraud. See sec. 6653(b); *Parks v. Commissioner*, 94 T.C. 654, 660-661 (1990); *Petzoldt v. Commissioner*, 92 T.C. 661, 699 (1989).

2. *Underpayment*

Respondent has shown that TCM underpaid tax for 1987 by failing to report: (1) $298,601.27 from NSA checks payable to Camaro; (2) $19,738.65 from 17 checks from various sources that TCM diverted to the Double D account; and (3) $3,804.98 from Midtex Relays and NSA checks deposited to petitioner's personal account or cashed by petitioner. Respondent has also shown that petitioner underpaid tax by failing to report constructive dividend income from TCM of $308,723.36 in 1987 and his distributive share of TCM income of $1,421,217.97 in 1988. Therefore, respondent meets this requirement.

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3. *Fraudulent Intent*

For purposes of section 6653(b), fraud is the intentional commission of an act to evade a tax believed to be owing. *Webb v. Commissioner*, 394 F.2d 366, 377 (5th Cir. 1968), affg. T.C. Memo. 1966-81. Fraud is never presumed; it must be established by affirmative evidence. *Beaver v. Commissioner*, 55 T.C. 85, 92 (1970).

To establish that petitioner is liable for the fraud penalty for 1987 and 1988, respondent must show by clear and convincing evidence that petitioner knew he was taxable in each of those years on at least some of the funds that he caused NSA to divert from TCM to Camaro and some of the funds he diverted from TCM to Double D or to his personal account. To establish that TCM is liable for the fraud penalty for 1987, respondent must show by clear and convincing evidence that petitioner, as president and CEO of TCM, also knew TCM was liable for tax on at least some of the funds he caused NSA to divert from TCM to Camaro and some of the funds he diverted from TCM to Double D or to his personal account.

The Commissioner may prove fraud by circumstantial evidence because direct evidence of the taxpayer's intent is rarely available. *Stephenson v. Commissioner*, 79 T.C. 995, 1005-1006 (1982), affd. 748 F.2d 331 (6th Cir. 1984).

Appendix D

4. *Badges of Fraud*

a. *Fraud as to Petitioner*

Courts have developed several objective indicators, or "badges", of fraud. *Recklitis v. Commissioner*, 91 T.C. 874, 910 (1988). Several indicia that petitioner knew that he was taxable on at least some of the funds he diverted from TCM are present in this case.

Concealing income from one's return preparer can be evidence of fraud. *Korecky v. Commissioner*, 781 F.2d 1566, 1569 (11th Cir. 1986), affg. T.C. Memo. 1985-63; *Farber v. Commissioner*, 43 T.C. 407, 420 (1965), modified 44 T.C. 408 (1965). Petitioner did not give White records of any Camaro accounts or tell White that he used Camaro funds for personal purposes or that he had Camaro make payments to his family and friends. Petitioner did not tell White that he received the NSA checks in Huntsville and sent them to Hong Kong.

Petitioners contend that petitioner did not have signature authority over Camaro's bank accounts in 1987 and 1988 because Camaro's board of directors revoked petitioner's signature authority over Camaro's SCB accounts by resolution dated December 13, 1983.

Respondent contends that SCB did not receive Camaro's revocation of petitioner's signature authority. Petitioners maintain that respondent has not proven that SCB did not receive the revocation resolution because respondent did not show that respondent had possession of all of SCB's

documents relating to Camaro's accounts. We disagree. A letter from the legal department of SCB dated September 29, 1997, states that the bank does not have a copy of Camaro's December 13, 1983, resolution.

Petitioners point out that petitioner did not write checks on Camaro's SCB accounts while he had signature authority over those accounts. That fact is not significant because petitioner could and did direct Choy to make transfers from the Camaro accounts to him or on his behalf.

A taxpayer's use of a complex scheme to divert income from his corporation to third parties he controls may be evidence of the taxpayer's attempt to conceal income. *Bradford v. Commissioner*, 796 F.2d 303, 307-308 (9th Cir. 1986), affg. T.C. Memo. 1984-601. Petitioner arranged for payments from NSA to bypass TCM and instead to be paid to Camaro and for payments from various sources, including Midtex Relays, to bypass TCM and be paid to Double D or petitioner.

A taxpayer's diversion of corporate funds for his or her personal use is evidence that the taxpayer committed fraud. *Solomon v. Commissioner*, 732 F.2d 1459, 1460-1461 (6th Cir. 1984), affg. T.C. Memo. 1982-603; *United States v. Brill*, 270 F.2d 525, 527 (3d Cir. 1959). Petitioner used Camaro to divert NSA payments to himself and to his family and friends through an opaque series of transfers in 1987 and 1988. Petitioner knew about but did not report the diverted payments. This badge of fraud applies to petitioner for 1987 and 1988 because he knowingly diverted NSA's payments for his personal use in both years.

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Petitioners contend that the fact that respondent took 8 to 10 years to determine the taxation of the unreported income in dispute here shows that respondent had doubts about this case and so has not proven by clear and convincing evidence that petitioner and TCM are liable for fraud for the years in issue. We disagree. Petitioner should not benefit from the fact that it took respondent a long time to penetrate the maze petitioner chose to create.

Respondent has clearly and convincingly proven that petitioner had the requisite fraudulent intent, and that all of petitioner's underpayments are due to fraud.[11] Thus, petitioner is liable for the addition to tax for fraud under section 6653(b) for 1987 and 1988.

b. *Fraud as to TCM*

We have found that petitioner is liable for the fraud penalty for 1987 and 1988. See paragraph B-4-a, above. Respondent also contends that TCM is liable for fraud for failure to report substantially the same amounts for 1987 that petitioner prevented TCM from receiving. Specifically, respondent contends that TCM is liable for fraud for 1987 because petitioner concealed from TCM's tax preparer information about the NSA, Midtex Relays, and other checks

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11. Even if we found that respondent established by clear and convincing evidence that petitioner is liable for fraud only on the payments he diverted from TCM to Double D or his own checking account, the burden would then shift to petitioner to show how much of the underpayment is not due to fraud. Sec. 6653(b)(2). Petitioner has not shown that any of the underpayments for 1987 and 1988 was not due to fraud.

diverted from TCM's account, petitioner signed TCM's 1987 return even though he knew it was inaccurate and omitted substantial income, TCM pled guilty under section 7206(1) to knowingly making false statements on its amended 1988 return, and petitioner used a complex series of transactions to divert payments from NSA to himself and Camaro.

Fraud is never presumed or imputed; it must be established by independent evidence of fraudulent intent. *Toussaint v. Commissioner*, 743 F.2d 309, 312 (5th Cir. 1984), affg. T.C. Memo. 1984-25; *Petzoldt v. Commissioner*, 92 T.C. 661, 700 (1989); *Beaver v. Commissioner*, 55 T.C. 85, 92 (1970). We may not impute from our finding that petitioner is liable for fraud that TCM is also liable for fraud. To establish that TCM is liable for the fraud penalty for 1987, respondent must show by clear and convincing evidence that, as president and CEO of TCM, petitioner, in addition to having knowledge of his own obligation to report the income he prevented TCM from receiving, knew that TCM was liable for tax on at least some of the funds he caused NSA to divert from TCM to Camaro in 1987. We conclude that respondent has not clearly and convincingly made that showing.

Petitioner concealed the NSA payments to Camaro from TCM's employees. Respondent has not proven by clear and convincing evidence that petitioner knew TCM was taxable on funds he arranged for NSA to pay to Camaro, checks from various sources that TCM diverted to the Double D account, and checks from Midtex Relays and NSA deposited to petitioner's personal account or cashed by petitioner. We are convinced that petitioner knew he was taxable on those funds but not that he knew that both TCM and he were taxable on the same funds.

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TCM's conviction under section 7206(1) for filing a false return for 1988 does not show that TCM committed fraud in 1987. We do not consider TCM's conviction under section 7206(1) in 1988, on different facts, as evidence of fraud in 1987. *Klein v. Commissioner*, T.C. Memo. 1984-392, affd. 880 F.2d 260 (10th Cir. 1989); *Corson v. Commissioner*, T.C. Memo. 1965-214, affd. 369 F.2d 367 (3d Cir. 1966).

We conclude that respondent has not shown by clear and convincing evidence that TCM fraudulently intended to underpay tax for 1987.

C. *Statute of Limitations*

The statute of limitations does not bar respondent from assessing and collecting tax from petitioner for 1987 and 1988 because we have found that petitioner committed fraud for those years. Sec. 6501(c)(1).

TCM timely filed its 1987 Federal income tax return on March 15, 1988. The 3-year limitation on the time to assess tax for TCM's 1987 Federal income taxes normally would have expired on March 15, 1991. Petitioners argue that the 3-year limitation bars assessment of tax for TCM for 1987. Respondent argues that it does not because the time to assess tax was tolled during the pendency of the summons enforcement proceedings. Sec. 7609(e).

If an administrative summons served on a "third-party recordkeeper" requires the production of records on the affairs of another person, sec. 7609(a), that person may stay compliance with the summons by giving notice in writing to

the person summoned not to comply with the summons, sec. 7609(b). SCB extended credit to petitioner through the SCB VISA card in 1987 and 1988 and, thus, was a third-party recordkeeper. Sec. 7609(a)(3)(C).

When a taxpayer commences a proceeding to quash a summons in which he or she is identified, the period of limitations is suspended during the period that the proceeding and appeals with respect to the enforcement of the summons are pending. Sec. 7609(e)(1).[12]

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12. Sec. 7609(e) provides in pertinent part as follows: SEC. 7609(e). Suspension of Statute of Limitations.—

> (1) Subsection (b) action.—If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.
>
> (2) Suspension after 6 months of service of summons.--In the absence of the resolution of the summoned party's response to the summons, the running of any period of limitations under section 6501 or under section 6531 with respect to any person with respect to whose liability the summons is issued (other than a person taking action as provided in subsection (b)) shall be suspended for the period—

(Cont'd)

Appendix D

If a third party contests a summons and the summons dispute is not resolved within 6 months, the period of limitations is suspended from the date which is 6 months after the service of the summons until the final resolution of the matter. Sec. 7609(e)(2).

1. *Suspension of the Limitation on the Time To Assess Tax by Section 7609(e)(1)*

On October 4, 1990, respondent issued nine third-party administrative summonses concerning TCM's income tax liability for 1987. TCM filed the Alabama petition to quash on October 10, 1990, 156 days before the date which is 3 years after TCM filed its 1987 return. Thus, 156 days remained at that time before the expiration of the 3-year period of limitations with respect to TCM's 1987 taxable year.

On June 10, 1991, after it had denied the Alabama petition to quash as to all but one of the summonses, the Alabama District Court granted the petition with respect to that summons. Under 28 U.S.C. section 2107(b) and rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure, the 60-day period for appeal of the Alabama District Court's June 10, 1991, order expired August 9, 1991. Thus, the running of the period of limitations remained suspended by section

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(Cont'd)

(A) beginning on the date which is 6 months after the service of such summons, and

(B) ending with the final resolution of such response.

7609(e)(1) until August 9, 1991. *Hefti v. Commissioner*, 97 T.C. 180, 199-200 (1991), affd. 983 F.2d 868 (8th Cir. 1993); sec. 301.7609-5(b), Proced. & Admin. Regs.

2. *Continuation of the Suspension of the Limitation on Time To Assess Tax by Section 7609(e)(2)*

On October 11, 1990, respondent issued a third-party administrative summons to SCB concerning TCM's 1987 income tax liability. On November 2, 1990, SCB's attorneys responded to, but did not produce the documents identified in, the SCB summons. The 3-year statute was thus tolled by section 7609(e)(2) on April 11, 1991, the date which is 6 months after respondent served the SCB summons.

On March 24, 1992, the New York District Court stayed the enforcement of the SCB summons pursuant to joint stipulation between the United States and SCB (and HSBC).

On December 16, 1998, the United States withdrew its motions to enforce the SCB and HSBC summonses.

3. *Petitioners' Contentions*

Petitioners contend that section 7609(e) does not suspend the period of limitations here because of defects in the SCB summons. We disagree. A District Court has jurisdiction to decide the merits of a petition to quash summons. Sec. 7609(h)(1). Petitioners may not collaterally attack the New York District Court's proceeding in this Court. See *Shaheen v. Commissioner*, 62 T.C. 359, 364-365 (1974); *Roberson v. Commissioner*, 41 T.C. 577, 581 (1964).

Petitioners also contend that, because the parties agreed that applying for letters rogatory was the proper procedure for seeking information and documents from SCB and HSBC, the stipulation agreed to on March 24, 1992, was the final resolution of the SCB and HSBC summons dispute and ended the tolling of the period of limitations. We disagree that the stipulation ended the SCB summons dispute for purposes of section 7609(e)(2)(B). The enforcement of the SCB and HSBC summonses remained pending in the New York District Court until December 16, 1998, when that court entered a stipulation in which the United States withdrew its motion to enforce the SCB summons.

The deficiency notice was mailed to TCM on May 12, 1999, which is 147 days after the date of the final resolution of SCB's - 36 - response to the SCB summons (December 16, 1998). That is less than the 156 days remaining in the 3-year period of limitations. Thus, the notice of deficiency of May 12, 1999, was timely mailed.

D. *Substantial Understatement Under Section 6661*

Respondent determined that petitioner is liable for the addition to tax under section 6661 for substantial understatement of income tax for 1987 and 1988 and that TCM is liable for the addition to tax under section 6661 for 1987. Petitioner bears the burden of proving that respondent erred in imposing the addition to tax under section 6661. Rule 142(a)(1).

Appendix D

Petitioners contend that they did not substantially understate their income tax for 1987 and 1988. Petitioners raise no other defense. We conclude that petitioners are liable for the section 6661(a) addition to tax.

To reflect the foregoing,

Decisions will be entered under Rule 155.

APPENDIX E — DECISION OF THE UNITED STATES TAX COURT ENTERED SEPTEMBER 24, 2002

UNITED STATES TAX COURT

Docket No. 13469-99

20TH CENTURY MARKETING, INC.

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the opinion of the Court filed March 28, 2002, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED AND DECIDED: That there is a deficiency in income tax due from the petitioner for the taxable year ended December 31, 1987 in the amount of $117,638.00;

That there is no addition to tax due from the petitioner for the taxable year ended December 81, 1987, under the provisions of I.R.C. §§ 6653(b)(1)(A) and 6653(b)(1)(B); and

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That there is an addition to tax due from the petitioner for the taxable year ended December 31, 1987, under the provisions of I.R.C. § 6661, in the amount of $29,410.00.

s/ John O. Colvin
Judge.

Entered: SEP 24 2002

APPENDIX F — DECISION OF THE UNITED STATES TAX COURT ENTERED SEPTEMBER 24, 2002

UNITED STATES TAX COURT

Docket No. 13468-99

DOMER L. ISHLER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the opinion of the court filed March 28, 2002, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED AND DECIDED: That there are deficiencies in income tax due from the petitioner for the taxable years 1987 and 1988 in the amounts of $111,614.00 and $401,473.00, respectively;

That there is an addition to tax due from the petitioner for the taxable year 1987, under the provisions of I.R.C. § 6653(b)(1)(A), in the amount of $83, 711.00;

Appendix F

That there is a penalty due from the petitioner for the taxable year 1987, under the provisions of I.R.C. § 6653(b)(1)(B), in an amount equal to 50 percent of the statutory interest due on $111,614.00;

That there is an addition to tax due from the petitioner for the taxable year 1988, under the provisions of I.R.C. § 6653(b), in the amount of $301,105.00; and

That there are additions to tax due from the petitioner for the taxable years 1987 and 1988, under the provisions of I.R.C. § 6661, in the amounts of $27,904.00 and $100,368.00, respectively.

s/ John O. Colvin
Judge.

Entered: SEP 24 2002

Supreme Court, U.S.
FILED
JUN 28 2004
OFFICE OF THE CLERK

(2)

No. 03-1480

In the Supreme Court of the United States

DOMER L. ISHLER AND
20TH CENTURY MARKETING, INC., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

EILEEN J. O'CONNOR
Assistant Attorney General

BRUCE R. ELLISEN
TERESA T. MILTON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether the judicial estoppel doctrine is applicable to the facts of this case.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the *Federal Reporter* but is *reprinted in* 88 Fed. Appx. 385. The opinion of the Tax Court (Pet. App. 20a-55a) is not published in the *Tax Court Reporter* but is *available in* 2002 WL 467216.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 2003. On March 3, 2004, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including April 23, 2004, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Ishler was the president and sole shareholder of petitioner 20th Century Marketing, Inc. (TCM), a corporation that acted as the sales representative for various electronics companies. Pet. App. 22a, 27a. In 1986, TCM sold small quantities of radio/cassette players for Nissei Sangyo America, Ltd. (NSA) to the Chrysler Corporation, earning a commission on each sale. *Id.* at 27a, 30a-31a.

In 1987, after Chrysler indicated that it would place a large order for the players, NSA drafted an agreement to govern its relationship with TCM with respect to these sales. Pet. App. 27a-28a. Ishler, however, asked NSA to name a shell corporation, Camaro Trading Co., Ltd. (Camaro), not TCM, as the sales representative on the account and to pay commissions to Camaro, even though Camaro had played no role in the sale of the players and NSA continued to treat TCM as its sales representative. *Id.* at 28a, 31a-32a.

Throughout 1987 and 1988, Ishler directed Camaro to make substantial payments to him or on his behalf. Pet. App. 32a-35a. Ishler did not disclose those payments to his accountant and did not report the Camaro funds on his or TCM's tax returns for 1987 and 1988. *Id.* at 36a. In addition, Ishler deposited checks payable to TCM directly into his personal bank account and used TCM's funds for the benefit of himself and his family. *Id.* at 30a-31a.

In March 1997, petitioners were indicted by a grand jury on several counts of tax evasion and tax fraud. Under a plea agreement with the United States, TCM pleaded guilty to filing a false tax return, and Ishler pleaded guilty to making a false statement in a loan application by failing to disclose a $100,000 loan that he

had received from Camaro. Pet. App. 37a; see 18 U.S.C. 1014. In anticipation of an action to recover unpaid taxes, the plea agreement provided that it "in no way applies to or limits any pending or prospective proceedings, related to the defendant's *tax liabilities*, if any." Pet. App. 9a.

2. The Commissioner of Internal Revenue audited petitioners and determined that TCM had understated its income in 1987 and 1988 by failing to report the commissions it had earned but diverted to Ishler and Camaro. Pet. App. 39a-40a. In addition, the Commissioner determined that Ishler had over $1 million of unreported income in 1987 and 1988 as a result of his receipt of funds from TCM and Camaro. *Id.* at 40a. Finally, the Commissioner concluded that Ishler was subject to a tax-fraud penalty for tax years 1987 and 1988 and that TCM was liable for that penalty for 1987.

3. The Tax Court upheld the Commissioner's determinations in substantial part. Pet. App. 20a-55a. After a trial, it found that Ishler had diverted TCM's funds for his personal use by directly depositing checks payable to TCM into his own account and re-directing sums TCM had earned to Camaro and then himself. *Id.* at 30a-35a. It further found that petitioners had understated their incomes by failing to account for those diverted funds. *Id.* at 39a-44a. The Tax Court concluded that Ishler had failed to report constructive dividends from TCM in the amount of $308,723.36 in 1987, and had failed to report his distributive share of TCM's unreported income of $1,421,217.97 in 1988. *Id.* at 44a. Ishler and TCM were liable for income tax deficiencies (*id.* at 56a-59a) in the aggregate amount of $513,087 and $117,638, respectively, and both owed additions on those taxes. Ishler was also found liable

for a tax penalty for fraud under then 26 U.S.C. 6653(b) (Supp. V 1987). Pet. App. 59a.

4. In a summary opinion, the court of appeals affirmed. Pet. App. 1a-2a. It concluded that "the Tax Court's findings are amply supported, and thus not clearly erroneous." *Id.* at 2a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioners contend (Pet. 3) that in characterizing the transfer of funds from Camaro to Ishler as the payment of income, rather than a loan, the lower courts "ignored" the judicial estoppel doctrine. Specifically, they claim that, under settled principles of judicial estoppel, respondent cannot argue that the transfers constituted income, because Ishler's 1997 plea agreement represented that Ishler had received a $100,000 loan from Camaro.* Pet. 4-6.

Petitioners fail to identify any conflict among the circuit courts over general principles of judicial estoppel. To the contrary, they seek to challenge only the fact-bound application of well-settled legal principles to this case. There is thus no disagreement among the circuit courts to warrant further review by this Court.

---

* The petition contains no argument concerning petitioner TCM's guilty plea, and TCM did not argue below that its plea agreement precludes the deficiency determined against it. TCM therefore may not challenge the lower court's decision with respect to it. *Glover* v. *United States*, 531 U.S. 198, 205 (2001) ("[i]n the ordinary course we do not decide questions neither raised nor resolved below"); *TRW Inc.* v. *Andrews*, 534 U.S. 19, 34 (2001) (declining to reach issue "because it was not raised or briefed below").

2. In any event, the decision below is correct. Judicial estoppel is inapplicable here because the plea agreement, by its terms, can have no preclusive effect in this proceeding. The plea agreement expressly provides that it will "in no way appl[y] to or limit[] any pending or prospective *forfeiture* or other civil or *administrative proceedings*." Pet. App. 9a. It further states that the agreement "in no way applies to or limits any pending or prospective proceedings, related to the defendant's *tax liabilities*, if any." *Ibid.* The obvious purpose and effect of these provisions is to preclude petitioners from asserting estoppel arguments based on the representations in the plea agreement.

3. In addition, even assuming *arguendo* that judicial estoppel may be available against the government, the facts of this case would not support the application of judicial estoppel. Judicial estoppel requires that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis* v. *Wakelee*, 156 U.S. 680, 689 (1895). Respondent's position is not "clearly inconsistent" with the plea agreement, as judicial estoppel requires. *New Hampshire* v. *Maine*, 532 U.S. 742, 750 (2001).

The plea agreement represented only that Ishler had "submitted false financial statements wherein he failed to disclose that he had a loan in the approximate amount of $100,000.00 outstanding to Camaro." Pet. App. 4a. This representation is not clearly inconsistent with the Tax Court's determination that "all of TCM's unreported income was constructive dividend income to petitioner [Ishler] because he caused NSA to divert

TCM's income to Camaro and he used some of the diverted funds for his own benefit." *Id.* at 43a. The decision of the Tax Court does not require that every transaction between Camaro and Ishler be characterized as the payment of income. Rather, it rests on the finding that Ishler caused the diversion of income from TCM to Camaro and diverted some of those funds for his own use. See *id.* at 30a-35a, 42a-43a. There is no inconsistency between those findings and Ishler's earlier admission in the plea agreement that he borrowed some money from Camaro, because the record does not show that Camaro's sole asset was this diverted income.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

EILEEN J. O'CONNOR
Assistant Attorney General

BRUCE R. ELLISEN
TERESA T. MILTON
Attorneys

JUNE 2004